

STATE OF MICHIGAN
COURT OF APPEALS

TRAFFORD PARK INSURANCE, LTD.,

Plaintiff-Appellee,

V

ROSKAM BAKING COMPANY,

Defendant-Appellant.

UNPUBLISHED

July 26, 2002

No. 228593

Kent Circuit Court

LC No. 96-003883-NZ

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order granting plaintiff additur or, in the alternative, a new trial. We reverse and remand.

The only issue on appeal is whether the court abused its discretion when it granted plaintiff's motion for judgment notwithstanding the verdict, awarding plaintiff \$349,557.13 in damages in lieu of the jury award of \$24,591.76 or, in the alternative, a new trial on the issue of damages.

I

Defendant, pursuant to a contract, was the sole producer of Rice Krispy Treats cereal ("RKT") for Kellogg Company ("Kellogg"). On March 1, 1996, a fire occurred at defendant's manufacturing facility, which interrupted production of RKT. Kellogg filed a claim for business interruption with plaintiff, its wholly owned subsidiary, which paid Kellogg \$731,010.¹ Plaintiff, as Kellogg's equitable subrogee, filed this suit against defendant for breach of contract, seeking lost profits during the business interruption period.

II

A trial court's decision regarding additur or remittitur is reviewed on appeal for an abuse of discretion. *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court made its decision, would conclude that there was no justification for the

¹ The amount paid represents the total claim of \$831,010 less a deductible of \$100,000.

ruling. *Szymanski v Brown*, 221 Mich App 423, 431; 562 NW2d 212 (1997). Trial courts likewise have discretion in granting a new trial, and this Court will not reverse absent a palpable abuse of discretion. *Setterington*, *supra* at 608.

The adequacy of the amount of damages is generally a matter for the jury. *Kelly v Builders Square, Inc.*, 465 Mich 29, 35; 632 NW2d 912 (2001). In determining whether additur is appropriate, the proper consideration is whether the jury award was supported by the evidence. *Setterington*, *supra* at 608. The inquiry is limited to objective considerations concerning the conduct of the trial and the evidence adduced to determine if an adjustment should be made. *Id.* A new trial may be granted when excessive or inadequate damages were awarded as apparently influenced by passion or prejudice or when the verdict was clearly or grossly inadequate or excessive. MCR 2.611(A)(1)(c) and (d).

III

Defendant argues that there was adequate evidence to support the jury's verdict awarding plaintiff \$24,591.76 in damages. Plaintiff's expert testified that Kellogg suffered \$824,940 in lost profits, which he calculated by subtracting the actual sales of RKT from the forecasted sales for a six-week business interruption period.

Defendant's expert witness attacked the reliability of the forecasted sales figures, as well as the length of the business interruption period. He also opined that plaintiff's expert's calculation of losses failed to take into account the substantial inventory of RKT, which was used to fill customer orders until production resumed. The expert relied on plaintiff's "contract product tracking summaries,"² admitted at trial, plaintiff's expert's analysis and report, deposition testimony from other witnesses, and his own schedules, also admitted into evidence, to support his opinions and testimony.

In granting additur or a new trial, the court discounted defendant's expert's testimony, stating:

Essentially, the crux of Mr. Wilson's criticism [of plaintiff's lost profit calculations] is (a) that the estimates are not sufficiently reliable and, (b) that Kellogg should not have curtailed its advertising program and short-shipped its distributors and retailers. To satisfy Mr. Wilson's criticisms it would have been necessary for Kellogg to exhaust its inventory and, as the Court recalls, Mr. Wilson said that. His formula would be to continue to pursue its business as if nothing had happened, initiating a major advertising campaign and filling all orders from its distributors and retailers until it ran out. The difficulty with these conclusions is first, that it contravenes the standard methodology for calculating a business interruption loss resulting from lost sales as Mr. Wilson admitted and, second, it denies Kellogg, the insured, the right to make reasonable business decisions as to how to handle a catastrophic occurrence which may jeopardize its market. It does both of these without any supporting evidence.

² These summaries were prepared by Kellogg and track planned and actual production, estimated and actual sales, and projected and actual inventory of RKT on a weekly basis for the entire year.

The court noted that the jury's verdict tracked defendant's theory of damages, but concluded that there was no evidence to support it because there was no evidence to support defendant's expert's conclusions. We disagree.

First, the court stated that defendant's expert failed to consider the effect of Kellogg canceling the marketing campaign for RKT, which it had planned to launch shortly before the fire and Kellogg's decision to short-ship to its customers. However, defendant's expert testified that he did not consider these effects because no evidence was presented to allow him to measure the impact. No evidence was introduced at trial as to how these measures quantitatively affected sales of RKT. Therefore, any consideration of the effect of these measures would be based on speculation. Damages based on speculation or conjecture are not recoverable. *Berrios v Miles, Inc.*, 226 Mich App 470, 478; 574 NW2d 677 (1997). Although damages are not precluded for lack of precise proof, there must be a reasonable basis for computation. *Id.*

Second, the court noted that defendant's expert "voiced no criticism of the methodology used by Kellogg to develop these estimates [the weekly estimated sales]." Defendant's expert was a CPA and certified valuation analyst. His purpose was to analyze and criticize plaintiff's expert's conclusions, not to suggest how Kellogg could have been more accurate in its weekly estimated sales, and the fact that he did not is irrelevant.

Lastly, the court stated that defendant's expert admitted that plaintiff's expert's methodology in calculating a business interruption loss was correct, and concluded that defendant failed to provide any reliable criticism or evidence as to what the loss would be. Defendant was under no obligation to present evidence regarding Kellogg's lost profits. "A party asserting a claim has the burden of proving his damages with reasonable certainty." *Id.*

Additionally, defendant did present criticism of plaintiff's expert's lost profit analysis. While defendant's expert agreed that, under standard methodology, estimated sales figures would be used, he took issue with their use by plaintiff's expert in this case because they were too unreliable. Defendant's expert reviewed Kellogg's historical data of estimated sales versus actual sales of RKT, and, when analyzed on a week to week basis, Kellogg's estimates were consistently inaccurate. Plaintiff's witnesses conceded that the forecasts were inaccurate. Defendant's expert testified that if Kellogg's estimated versus actual sales would have been closer, it would have been appropriate to use the estimated figures. Therefore, defendant's expert calculated Kellogg's lost profits using the only reliable figures, actual sales and actual inventory, based on plaintiff's proofs. Defendant also presented evidence that the business interruption period was only four weeks, not six weeks as plaintiff asserted.

The jury was free to accept or reject any portion of the evidence that plaintiff presented regarding damages. *Joerger v Gordon Food, Inc.*, 224 Mich App 167, 172; 568 NW2d 365 (1997). The jury apparently determined that plaintiff's expert's calculations were unreliable and, therefore, plaintiff failed to meet its burden of proving lost profits, according to plaintiff's expert's methodology, with reasonable certainty. The jury's award of damages need only be supported by the evidence. *Setterington, supra* at 608. We hold that defendant presented adequate evidence to support the jury's verdict, and the court abused its discretion when it concluded otherwise.

Reversed and remanded for reinstatement of the jury's verdict. The court's order granting additur is vacated. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Helene N. White

/s/ Donald S. Owens